

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DAVID W. SPENCER,

Petitioner-Appellee,

v

STATE EMPLOYEES RETIREMENT BOARD,

Respondent-Appellant.

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UNPUBLISHED

October 13, 2005

No. 252954

Chippewa Circuit Court

LC No. 98-003696-AA

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Respondent appeals by leave granted from a circuit court order reversing its order denying petitioner's application for non-duty disability retirement benefits under MCL 38.24. We reverse and remand for reinstatement of respondent's order.

Petitioner, a correctional officer with the Department of Corrections (DOC), filed for disability retirement benefits, claiming that back problems disabled him from further employment with the state. Respondent denied petitioner's application for benefits, finding that petitioner failed to show that he was totally and permanently disabled or that his injuries were duty related. Petitioner appealed the denial and requested an administrative hearing. Subsequently, an administrative hearing was held and the hearing officer issued a proposal for decision, recommending denial of disability retirement benefits because the medical evidence did not support a finding of total and permanent disability. On January 22, 1998, respondent issued an order adopting the hearing officer's findings of fact and conclusions of law.

Petitioner retained new counsel and filed a motion for rehearing, seeking to introduce new evidence into the record. Respondent denied petitioner's request for rehearing and petitioner appealed that decision to the circuit court. The circuit court remanded the matter back to respondent for consideration of petitioner's new evidence. After two reexaminations of the evidence by the hearing officer, the respondent adopted the second supplemental proposal for decision and denied benefits. Petitioner appealed the decision to the circuit court. The circuit court reversed respondent's decision, finding it to be arbitrary and capricious and not supported by the evidence in the record. It concluded that, given the evidence from his treating physicians, petitioner had established total disability by a preponderance of the evidence.

On appeal, respondent argues that the circuit court clearly erred in its review of its decision because it improperly substituted its judgment for that of the board. Further, it clearly

erred in determining that the respondent's decision was arbitrary and capricious and not supported by competent, material, and substantial evidence. We agree.

"A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary and capricious, was clearly an abuse of discretion, or was otherwise affected by substantial and material error of law." *Dignan v Pub School Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). "Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence." *Michigan Ed Ass'n Political Action Comm v Secretary of State*, 241 Mich App 432, 444; 616 NW2d 234 (2000). If the evidence is sufficient to support the agency's decision, the circuit court may not substitute its judgment for that of the agency, even if the court may have reached a different result. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992).

Further, when determining whether an agency's decision was supported by competent, material, and substantial evidence on the whole record, a court must review the entire record. *Great Lakes Sales, Inc v State Tax Comm*, 194 Mich App 271, 280; 486 NW2d 367 (1992). "Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact finding by displacing an agency's choice between two reasonably differing views." *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974). An agency's findings of fact are afforded deference, particularly with regard to witness credibility and evidentiary questions. *Black, supra*. It is not a function of the reviewing court to resolve conflicts in evidence or to pass on the credibility of witnesses. *Id*.

We find that it is apparent from the circuit court's ruling that it was not merely reviewing respondent's decision to determine if it was supported by substantial evidence in the record. Rather, the circuit court improperly weighed the medical evidence and the credibility of the medical witnesses. In fact, the circuit court stated in its order denying respondent's motion for reconsideration that it weighed the evidence and "determined [that] the petitioner's medical evidence was more credible on the issue of disability." Because it is not a reviewing court's function to resolve conflicts in the evidence or pass on the credibility of witnesses, we conclude that the circuit court's ruling is clearly erroneous.

Additionally, we find that the board's decision is supported by competent, material, and substantial evidence. While petitioner's treating physicians Drs. Ganzhorn and Slater opined that petitioner is totally and permanently disabled from employment with the DOC, Drs. Rose and Cilluffo concluded that petitioner is not totally and permanently disabled, with Drs. Goel and Gantz recommending sedentary work only. The board concluded, based on the recommendation of the administrative law judge, that the opinions of petitioner's treating physicians were outweighed by the opinions of the other physicians that examined petitioner. Due deference should be given to the board's choice between two reasonably differing views. *Michigan Employment Relations Comm, supra* at 124.

Moreover, we conclude that the circuit court clearly erred in finding that the respondent's decision was arbitrary and capricious.

This Court set forth the standard for determining whether an agency's decision is arbitrary and capricious in *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 63-64; 678 NW2d 444 (2003), which states as follows:

To determine whether an agency's decision is "arbitrary," the circuit court must determine if it is " ' "without adequate determining principle<sub>[s]</sub> . . . [f]ixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned." ' ' " *St Louis v Michigan Underground Storage Tank Financial Assurance Policy Bd*, 215 Mich App 69, 75; 544 NW2d 705 (1996), quoting *Bundo v Walled Lake*, 395 Mich 679, 703 n 17; 238 NW2d 154 (1976), quoting *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946). "Capricious" has been defined as: " ' "Apt to change suddenly; freakish; whimsical; humorous." ' ' " *St Louis, supra* at 75, quoting *Bundo, supra* at 703 n 17, quoting *Carmack, supra* at 243.

Because respondent adopted the hearing officer's findings of fact and conclusions of law, which were well-reasoned and detailed, analyzing all of the medical evidence, both favorable and unfavorable to the petitioner, its decision cannot be considered arbitrary or capricious.

Finally, we reject petitioner's argument that the circuit court's decision reversing the board should be affirmed because it reached the right result under the holding in *Knauss v State Employees' Retirement Sys*, 143 Mich App 644, 649-650; 372 NW2d 643 (1985). In *Knauss*, this Court held that a state employee seeking duty-disability retirement benefits need not show that he is totally incapacitated from any duty; rather, to qualify for benefits, he must show that his disability prevents him from performing his previous job or any other employment "reasonably related to [his] past experience and training." *Id.* at 648-650. And while *Knauss* dealt with duty-disability retirement benefits, this Court has extended its holding to cases, such as the instant action, which involve non-duty disability retirement benefits. See, e.g., *Jackson-Rabon v State Employees' Retirement Sys*, 266 Mich App 118, 120; 698 NW2d 157 (2005).

Even if we assume that petitioner's disability limits him to sedentary work only, he has failed to show that there is no sedentary work available to him at the DOC. To the contrary, respondent stated that such positions are available and, in fact, petitioner did that type of work in the past for the DOC. Therefore, we conclude that petitioner has not met his burden of establishing that his disability prevents him from performing a job within the DOC that is reasonably related to his past experience and training. *Knauss, supra* at 648-650.

Reversed and remanded for reinstatement of respondent's order denying petitioner's application for disability retirement benefits. We do not retain jurisdiction.

/s/ Peter D. O'Connell  
/s/ David H. Sawyer  
/s/ William B. Murphy